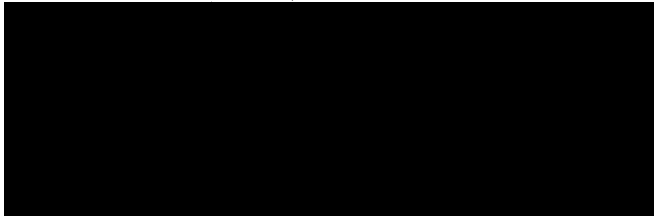




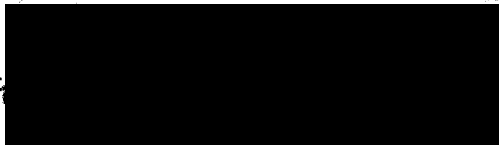
U.S. Citizenship
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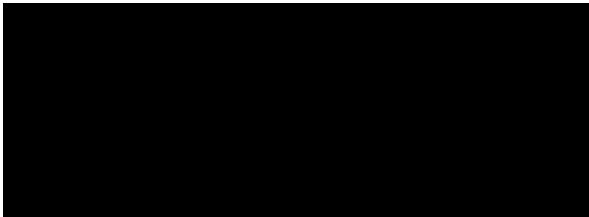
FILE: SRC 02 222 51912 Office: TEXAS SERVICE CENTER Date: **OCT -7 2004**

IN RE: Petitioner:
Beneficiary:



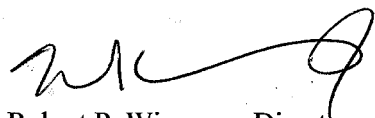
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been
returned to the office that originally decided your case. Any further inquiry must be made to that
office.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, DM[USA], INC., endeavors to classify the beneficiary as an executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims to be a subsidiary of DM Industries Ltd. located in Sri Lanka and is engaged in the trading business. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's managing director. The petitioner was incorporated in the State of Louisiana on March 19, 2001 and claims to have two employees.

On November 18, 2002, the director denied the petition because the petitioner failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity. The director further determined that the petitioner did not establish that it had secured sufficient physical premises to operate its business since the submitted lease indicated that the premises was to be used for residential purposes only.

On appeal, the petitioner's counsel states that the beneficiary does "in fact meet the definition of an executive" and that the owner of the leased property was "aware that it was not for residential use but rather for a business."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), if the petitioner was originally approved as a "new office" and is filing to extend the beneficiary's stay, the regulation states:

A visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the beneficiary will be primarily performing executive duties for the United States entity.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On July 15, 2002 the petitioner filed Form I-129. The Form I-129 stated that the beneficiary will "Establish the subsidiary trading office in the U.S. . . . to promote business directly with U.S. buyers. All prior to 2005, easing out of USA quota [system] in trade."

In a request for additional evidence, the director requested a list of the beneficiary's duties and the percent of time spent on each task and the names and educational credentials of any of the beneficiary's subordinates.

In response to the request for additional evidence, the petitioner submitted an October 7, 2002 letter describing the beneficiary's proposed U.S. duties:

[The beneficiary] promotes business directly with the United States and Sri Lanka often. He promotes business directly with United States buyers – arranging fabrics, quota for product, accessories from Far East, and oversees and arranges finance facilities. Oversees managerial staff in Sri Lanka and gives orders for manufacturing. He heads up a new promotion of Sri Lanka tea, rice, spices, and other products overseeing the set up of retail shops in California, Texas, and Louisiana. In late October/ November expected to launch Internet Sale Point for Sri Lanka food. . . . [The beneficiary] oversees the management of [the petitioner] including its start-up, initial investments, hiring/firing, etc. It is still a new company, but its future looks promising. He does have a professional on board, [REDACTED] who is an officer. Routine tasks are handled by secretary. [sic]

On November 18, 2002, the director denied the petition because the petitioner failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity. The director found that there was no documentary evidence to establish the employment of the claimed professional employee [REDACTED]. The director also found that the beneficiary was primarily performing the daily tasks of running the business.

On appeal, the petitioner's counsel states that the beneficiary does "in fact meet the definition of an executive." Counsel claims that the beneficiary "directs the management of the entire organization, (both here and or direction from other executives), is engaging in business and is hiring companies to conduct various functions within the organization, and is operating both in the United States and abroad."

In examining the executive capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has provided a nonspecific and unclear description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary's duties include "[e]stablish[ing] the subsidiary trading office" and "oversee[ing] the management of the U.S. company." The petitioner did not, however, clarify how the beneficiary establishes the trading office or oversees the management of the company. Based upon the description provided, it is unclear exactly how the beneficiary acts in a primarily executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, on appeal, counsel depicted the beneficiary as "directs the management of the entire organization." However,

conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary as being involved in "promot[ing] the business" and "head[ing] up a new promotion of Sri Lanka tea, rice, spices, and other products overseeing the set up of retail shops." Although the beneficiary claims he oversees the set up of retail shops, it is unclear that the beneficiary will oversee any subordinate employees, rather than performing the basic duties of setting up the shops himself. Since the beneficiary appears to actually promote the business and set up the shops, he is performing tasks necessary to provide a service or product. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Even though counsel on appeal claims that the beneficiary directs the management of the organization, the petitioner failed to either identify how the beneficiary directs the entire organization or establish the proportion of the beneficiary's daily duties attributed to directing the entire organization. In addition, the petitioner failed to provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary directs the function rather than performs the duties relating to the function. Based on the current record, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-executive administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is executive in nature, and what proportion is actually non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner listed the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel on appeal also claims that the petitioner has employed "individual subcontractors, professionals, companies, brokerage firms, etc." However, the petitioner submitted its 2001 U.S. Corporation Income Tax Return for the quarter of March 20, 2001 through December 31, 2001

indicating that no salaries or wages were paid and there was no cost of labor, as would be expended on contractors or outside assistance. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Counsel further indicates that the petitioner is "expected to hire permanent personnel during the next phase of implementation" and "to employ many United States workers upon its complete set up." However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly executive position.

Additionally, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A nonimmigrant visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily executive capacity. For this reason, the petition may not be approved.

The AAO now turns to the issue of whether the petitioner has established that it has secured sufficient physical premises to house the new office. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. At the time of filing for an extension, the petitioner must demonstrate that the United States entity has been doing business for the previous year and describe the staffing of the new operation. 8 C.F.R. §§ 214.2(l)(14)(ii)(B) and (D).

In the director's decision, she determined that the petitioner failed to establish that it has secured "adequate premises in which to conduct business and house other employees." The director found that the lease indicated that the premises were to be used as a private residence only.

On appeal, counsel claims that the lease is a "standard lease that the owner provided, however at all times the owner of the property was aware that it was not for residential use but rather for a business." The petitioner submits a letter from the property manager.

In this matter, the AAO is not persuaded that the petitioner has secured sufficient physical premises to house its operations, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). On appeal, the December 17, 2002 letter that the petitioner submits states, "D.M. USA, Inc. offices are located at 3535 Apollo Dr., Suite L-229, Metairie, LA 70003. The lease is for the period of November, 2002 thru April, 2003." However, this letter is insufficient evidence to indicate that the petitioner

has secured sufficient physical premises for its business. The lease submitted clearly states that "Apartment No. L229 at 3535 Apollo Dr. in Metairie, LA, for use by resident as a private residence only." Additionally, the lease did not described its anticipated space requirements for its trading business. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office.

The AAO notes that the petitioner filed for the beneficiary's L-1A extension on July 15, 2002; however, this lease was entered into on September 30, 2002 and submitted with the director's request for additional evidence on October 7, 2002. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this additional reason, the petition may not be approved.¹

Beyond the decision of the director, the AAO is not persuaded that, at the time the petitioner filed its petition on July 15, 2002, it had been doing business for the previous year as required by the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B). At the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii).

On appeal, counsel states, "Due to the weakening of the United States and world economy, the corporation is still being 'set up.'" Counsel also states that the parent company manufacturers goods for the United States consumer and warehouse locations or brokerage firms handle goods at different port locations. Additionally, the petitioner submitted its 2001 U.S. Corporation Income Tax Return indicating that for the quarter of March 20, 2001 through December 31, 2001 the petitioner had a negative taxable income. In addition, as previously noted, the petitioner did not claim to acquire any business premises until more than two months after filing this petition. Therefore, it does not appear that the company has been operating for the previous year. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D.

¹ As noted, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises. Regardless, since the petitioner did not acquire its claimed premises until after the filing of this extension petition, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.